

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-7180

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UNITED STATES COURT OF APPEALS
For the Second Circuit

PROGRAM FUNDING, INC.,

Plaintiff-Appellant,

- against -

PETER BRENNAN, Individually, and in his
capacity as Secretary of Labor;
WILLIAM KOLBERG, Individually, and in
his capacity as Assistant Secretary of
Labor of Manpower;
PIERCE A. QUINLAN, Individually, and in
his capacity as Associate Manpower
Administrator for Manpower Development
Programs;
ROBERT MC CONNAN, Individually, and in
his capacity as Director of National
Programs, Manpower Administration, United
States Department of Labor;
PAUL MAYRAND, Individually, and in his
capacity as Chief of the Migrant Division
Manpower Administration, United States Department
of Labor,

Defendant-Appellees.

BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

The decision herein appealed from was rendered by Judge Harold P. Burke, District Court Judge of the Western District of New York. The opinion is in the form of findings of fact and conclusions of law which are included in the Record on Appeal.

THE ISSUES

The issues presented by this appeal are:

1. Whether the trial judge abused his discretion in concluding that the Plaintiff did not have a substantial likelihood of success on the merits.
2. Whether the trial judge abused his discretion in determining that without a preliminary injunction the Plaintiff would suffer irreparable injury.
3. Whether the trial judge abused his discretion in concluding that the injunction would be consistent with the public interest.

STATEMENT OF THE CASE

The Plaintiff is a New York Not-for-Profit Corporation which was organized in the State of New York to coordinate all federally funded programs in the State of New York which were for the benefit of the rural poor and migrants coming into New York State. Since 1967 funds coming from the Federal Office of Economic Opportunities were under the direction in New York State of Program Funding, Inc., which either ran programs or funded and monitored programs operated by other Not-for-Profit organization of governmental units.

In 1974 programs that were being operated by the Office of Economic Opportunity were transferred to the United States Department of Labor.

To operate its new Manpower Programs, the United States Department of Labor adopted rules and regulations for the Comprehensive Employment and Training Act of 1973, which are found in 39 Federal Register 2840, Section 97.201 through 97.292. Program Funding, Inc. as well as a large number of other potential applicants filed initial eligibility statements with the United States Department of Labor. Program Funding, Inc. was the only organization found unconditionally qualified. Several other applicants were found conditionally qualified, including New York State Department of Labor, Suffolk Board of Supervisors and the Wayne County Board of Supervisors. Protests to the conditional eligibility was submitted by Program Funding, Inc. as being in violation of the rules and regulations. Qualification statements were filed by New York State Department of Labor, Suffolk County Board of Supervisors and Program Funding, Inc. Program Funding, Inc. was the only applicant who was found unconditionally eligible. Conditional eligibility statements were approved for New York State Department of Labor and the Suffolk County Board of Supervisors. The Wayne County application was found not sufficient on the basis of objections of Wayne County based upon the number of people in its jurisdiction. New York State, who had requested the right to file an application for the entire State of New York, filed a statement that it was adopting the Wayne County Board of Supervisors funding request and one other funding request as its own and filed no further papers papers, which was in violation of the rules and regulations.

Suffolk County filed a funding request although it had not met the eligibility and qualification requirements of the rule and regulations. Program Funding, Inc. also filed a complete funding request. A review procedure took place which was set forth in the rules and regulations as being a part of and required in evaluation of the various funding requests and was a part of a final order which was required to be issued according to the rules and regulations. Program Funding, Inc. has set forth, on information and belief, that the result of the reviews were that Program Funding, Inc. was recommended by all parties in the Department of Labor having any active role in supervising migrant and seasonal farm worker programs. After the recommendation was made, arbitrary political action occurred in violation of the United States Department of Labor's rules and regulations which cut Program Funding, Inc.'s recommended grant from the full \$585,000 to \$485,000, giving \$60,000 to New York State to be distributed to the Wayne County Board of Supervisors and \$40,000 to go to the Suffolk County Board of Supervisors. Both Boards of Supervisors were to add to their Manpower grants which they had for other urban type Manpower programs, training of seasonal farmworkers. Conditions were added to both grants which were in an attempt to have them complete the requirements under the rules and regulations which should have been completed prior to the time that the funding requests were submitted.

Program Funding, Inc. under the Freedom of Information Act requested copies of the qualification statements, eligibility statements and funding requests and also the reviews that had been done by the United States Department of Labor under the rules and regulations. This request was denied in full until the date of argument of the motion for preliminary

injunction on December 26, 1974, when the Respondent did supply the qualification statements and funding requests. The Plaintiff further requested an Administrative Hearing as provided by the rules and regulations which request was ignored until the argument for the motion for preliminary injunction in which the Respondents formally denied the application.

HISTORY OF THE CASE

Action was commenced by service of a Summons and Complaint on the Respondents on or about December 11, 1974. A Temporary Restraining Order was also granted by the Hon. John T. Curtin, Judge of the Federal Court for the Western District of New York, on the 13th day of December, 1974. Judge Curtin referred the matter to Judge Burke and the matter was argued on December 23, 1974. Judge Burke by an Order dated February 27, 1975, denied Plaintiff's application for preliminary injunction. The appeal was taken to the Second Circuit by a Notice of Appeal served March 10, 1975.

The Plaintiff amended its Complaint on or about December 31, 1974, and included a third cause of action, asking the Court in the alternative to judicially review the action of the Defendants on the grounds that granting to Wayne County and Suffolk County of funds was based upon the rules and regulations of the United States Department of Labor arbitrary and capricious. The Defendants filed their Answer after a notice that default would occur without an Answer on March 21, 1975. Motion has been brought by the Plaintiff for Summary Judgment on the first and second cause of action and for discovery as to the ratings performed according to the rules and regulations. Motions are returnable on the

14th day of April, 1975, in the Western District of New York.

ARGUMENT

POINT I

THE COURT HAS THE POWER TO ISSUE A PRELIMINARY INJUNCTION.

A party who complains of Federal action has the right to a preliminary injunction under certain circumstances until the parties' appeal of the administrative action is concluded. See Scripps-Howard Radio, Inc., vs. FCC, 316 U.S. 4, 9-10 (1942) and Sears Roebuck & Co., vs. NLRB, 473 F. 2d 91 (Court of Appeals, D.C., 1972) Cert. Den. 94 S.C. 1040. As set forth in Virginia Petroleum Jobbers Association vs. Federal Power Commission, 259 F. 2d 921, (Court of Appeals, D.C., 1958) the standards are as follows: (1) A substantial likelihood of success on the merits, (2) that without such relief the Plaintiff will suffer irreparable injury (3) that others will not be injured by the injunction, and (4) that an injunction would be consistent with the public interest.

The Plaintiff as will be hereinafter set forth maintains the Plaintiff has sustained its burden to meet these standards set by the Courts.

POINT II

THE PLAINTIFF HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

- A. THE COURT HAS JURISDICTION OVER ALL OF THE CAUSES OF ACTION SET FORTH IN THE PLAINTIFF'S COMPLAINT AND AMENDED COMPLAINT.
- 1. THE COURT HAS JURISDICTION OVER THE CAUSE OF ACTION TO COMPEL THE DEFENDANTS TO COMPLY WITH THE RULES AND REGULATIONS OF THE SECRETARY OF LABOR TO PROVIDE FOR THE PLAINTIFF AN ADMINISTRATIVE HEARING.

The Plaintiff as requested by filing a Petition for reconsideration

on December 11, 1974, an administrative hearing pursuant to Section 97.292 of the Rules and Regulations of the Secretary of Labor which became effective September 5, 1974. The Defendant through William J. Harris, Director of the Office of Investigations and Compliance (Exhibit M of the Defendants' Reply) has refused to permit the Plaintiff to have an administrative hearing pursuant to the Rules. The Plaintiff as shall be discussed hereafter, takes the position that the Plaintiff has an absolute right to a hearing pursuant to the Rules and Regulations of the Secretary. 28 U. S.C. 1361 provides that the Court has jurisdiction over all actions to compel an officer of the United States to perform his duty. The jurisdiction of all Federal Courts over what has been known in the common law as a Writ of Mandamus was added by the Laws of 1962. Thus when a Federal official fails to act as directed either by a statute of Federal officials own Rules and Regulations, the Court has jurisdiction to determine whether an Order should issue requiring the Federal official to comply with the law. See People vs. United States Department of Agriculture, 427 F. 2d 561 (Court of Appeals, D.C., 1970).

2. THE COURT HAS JURISDICTION OVER THE CAUSE OF ACTION TO DETERMINE WHETHER THE DEFENDANTS ARE WITHHOLDING INFORMATION PURSUANT TO THE FREEDOM OF INFORMATION ACT.

Title 5, Section 552 of the United States Code known as the Freedom of Information Act, is very specific in giving to the Court jurisdiction to determine all matters in which a private citizen believes that the Government is failing to provide information as required in the Act. Cases cited by the Defendants and including the Supreme Court decision of Environmental Protection Agency vs. Mink, 410 U.S. 73 (1973) clearly show that the Court has jurisdiction to consider all matters relating to whether the Defendants have complied with the Freedom of Information Act.

3. THE COURT HAS JURISDICTION TO REVIEW WHETHER THE ACTIONS OF THE DEFENDANTS WERE ARBITRARY AND CAPRICIOUS.

Title 5 of the United States Code, Chapter 7, Section 701 to 706 gives to the Court the right to review the action of the Defendants should the Court conclude that the Plaintiff has exhausted its administrative remedies. Nowhere in the Comprehensive Employment Act is judicial review explicitly denied, the form of proceeding is set forth under Section 703, and is properly set forth in the Complaint of the Plaintiff.

4. THE COURT MAY EXPAND THE JURISDICTIONAL STATEMENT IF REQUIRED IN ORDER TO SHOW THAT THE COURT HAS JURISDICTION OVER THE SUBJECT MATTER.

As stated in State Highway Commission of Missouri vs. Nolpe, 479 F. 2d 1099 (U.S. Court of Appeals, 8th Cir., 1973) the Court may in interpreting the cause of action set forth by the Plaintiff expand the jurisdictional statement. The Court found that there was a Federal Question as to whether due process was denied under 28 U.S.C. 1331 a, and that the controversy was over \$10,000 and therefore found that the Court could consider the matter even though the Federal questions of jurisdiction were not set forth in the Plaintiff's Complaint. In the case before the Court the Complaint does set forth that the controversy involved over \$10,000. It is submitted that determination as to whether the Plaintiff has a right to an administrative hearing and as to whether the Defendants were arbitrary and capricious in denying information to the Plaintiff and in failing to grant a hearing to the Plaintiff and further in making its determination in denying the Plaintiff the right to provide job training programs in Wayne County and Suffolk County are proper Federal questions which should be determined by the Court.

- B. THE DEFENDANTS SHOULD PROVIDE TO THE PLAINTIFF AN ADMINISTRATIVE HEARING.

The Rule specifying when a potential grantee may obtain an administrative hearing was adopted by the Secretary on September 5, 1974. To the Plaintiff's knowledge no Court action has considered the question of when a hearing is required. The Defendants set forth in their Exhibit M. that the Plaintiff is not entitled to an administrative hearing. While the Court must consider the views of the Defendants in interpreting their rules and regulations, the interpretations are not definitive. The Second Circuit Law is set forth in the case of Carey vs. Local Board No. 2 Hartford, Conn., 297 F. Supp. 252 (U.S. District Court, Conn., 1969) affirmed 412 F. 2d 71 (2nd Cir., 1969) at page 254

"However the fact that a statute may require administrative or judicial construction in order to determine what duties it creates does not mean that mandamus is not proper to compel the officer to perform that duty, once it is determined."

The Court stated in Baldrige vs. Hadley, 491 F. 2d 859 (10th Cir., 1974)

"Congressional enactments and administrative regulations should be interpreted broadly and liberally in order to effectuate their essential purposes."

In Schild vs. Busch, 293 F. Supp. 1353, 1354 (U.S. Dist. Court, Texas, 1968) the Court stated

"An administrative bodies' interpretation of its own regulations may be considered by a reviewing Court, but it is not conclusive."

The Court relief upon the decision in Richards vs. United States, 269 U.S. 1, 11 (1962).

All of the decisions made as to funding requests were made on or about December 6, 1974, and therefore there have been no prior administrative agency interpretations of the Department's own rules and regulations. The only prior dispute as to whether a potential grantee could have an administrative

hearing was according to the affidavit of Stuart Mitchell, resolved, an analogous situation in favor of the grantee. The Iowa Migrant Action Program located in Mason City, Iowa, filed a qualification statement specified in Rule 97.212 and specifying that it wished to provide services in all of the counties of Iowa, Minnesota, South Dakota and North Dakota. The corporation was found to be qualified applicant for all of the counties in Iowa, but not for any of the counties in the other states. The corporation requested a hearing and after some internal dispute was finally provided with a hearing pursuant to the rules and the specific requirements of Rule 97.214 D. Upon the review the Secretary determined that the corporation could submit a funding request for South Dakota. It is submitted that the one dispute which has already been determined is analogous to the Plaintiff's application and provides administrative support for the Plaintiff's position.

In the funding request requirement the applicant is required to set forth under Rule 97.215 B the geographic location served. Under Rule 97.218, any qualified applicant not selected for a grant may request a review. In Rule 97.210, the purpose of the administrative review is set forth. Under paragraph B, the Secretary has stated that the administrative review policy is to "Review of petitions for reconsideration arising out of the competitive procedures for determining qualified applicants and grantees." Under Rule 97.292, anyone who has failed to be designated as a potential grantee may file a Petition challenging the Department's decision not to award a grant. The question then is to determine whether the applicant should or should not have been awarded a grant. It is submitted that a competitive bidding procedure occurred for grants in every political unit under the Act within the United States. The Plaintiff filed a funding request in which it attempted to obtain grants for each of the 57 counties of New York State. The Governor of the State of New York filed a qualification statement requesting to be deemed

qualified to file a funding request for each of the 57 counties in the State. Although the Governor's qualification statement was conditionally accepted, the funding request submitted by the Governor as indicated in the Affidavit of Stuart Mitchell only contained a letter which appears to adopt as the Department of Labor's funding request the funding request filed by the County of Wayne Board of Supervisors for a project in Wayne County and the Geneseo Migrant Service for a project in Livingston County. The Suffolk Board of Supervisors submitted a proposal for a project in Suffolk County. While the Governor's letter appears to continue to request all of the funds go through the New York State Department of Labor, this was clearly in violation of the Act since no detailed funding request was submitted. Thus the only competition which occurred in New York State was the competition between Program Funding, Inc. and Suffolk County with the Suffolk County grant and the competition between Program Funding, Inc. and the New York State Department of Labor for programs in Wayne and Livingston County. It should be noted that it was only because of Program Funding, Inc.'s insistence on the following of rules and regulations that Wayne County and Geneseo Migrant Service that were not proper eligible applicants were required to submit their proposals through the New York State Department of Labor. Program Funding, was successful in the competition for Livingston and unsuccessful in the competition for Wayne and Suffolk County. Under the Commissioner's interpretation of its rules, Suffolk County Board of Supervisors could clearly have asked for an administrative hearing. The Secretary's representative concludes that while Suffolk County could have a hearing if it had lost in the competition that Program Funding, Inc. cannot. The rationale is that Program Funding, Inc. was given 54 counties which were not contested by any other applicants and was awarded the grant for Livingston County. This interpretation does not

logically follow from reviewing the general competitive process established by the authority of the statute and by the rules and regulations adopted September 3, 1974. The competitive process is clearly for separate distinct political geographic areas. While it is clear that the administrative procedures do not permit an administrative hearing to contest the amount of a grant, a clear authority is established for a hearing being given when the applicant does not obtain a specific geographic area for which the applicant has submitted a funding request. Since Program Funding, Inc. submitted a funding request for Suffolk County and Wayne County, which was denied by the Secretary, an administrative hearing should be given to determine whether the Secretary followed his own rules and regulations in awarding the grants to Suffolk County and the New York State Department of Labor for Wayne County.

C. THE PLAINTIFF IS ENTITLED TO ALL OF THE INFORMATION REQUESTED IN ITS REQUEST FOR INFORMATION UNDER THE FREEDOM OF INFORMATION ACT.

The Plaintiff through associations had requested copies of funding requests prior to the denial of the Plaintiff's request for Wayne County and Suffolk County. As indicated, the Defendants have always stated that they need not comply with the Freedom of Information Act because of their being exempt.

The only question in the Plaintiff's second cause of action, therefore is whether the Plaintiff is entitled to review reports made pursuant to Rule 97.212 of the Rules and the review report made pursuant to Rule 97.212 of the Rules.

The only response submitted by the Defendants to the Court is that the rating reports and review reports are "considered to be internal Department

of Labor documents and are not therefore subject to disclosure." Title 5, Section 552 gives the Court the right to consider whether the records should be submitted and requires that the agency have the burden of proving that they are not required under the Act to supply the information. The agency is required under paragraph B to keep a record and supply copies of all final opinions and oral orders made in the adjudication of cases. The only exemption that might apply in the case before the Court is (e) (5) "Inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency."

As stated in Sterling Drug, Inc. vs. FTC Case, 450 F 2d 698 (Court of Appeals, D.C., 1971) at page 703

"The Freedom of Information Act was intended to increase the citizen access to government records."

The Court pointed out that if in an action the Plaintiff could have obtained the identifiable documents in an action, then the citizen should be allowed to obtain the documents in a proceeding brought under the Freedom of Information Act. The Court also set forth that when a document contains exempt material as well as material that can be obtained under the Act, that the Court has the power to delete those portions that are exempt and to give to the Plaintiff those portions that are not exempt. As the Supreme Court stated in E.P.A. vs. Mink, 410 U.S. 73 (1973) cited by the Defendant the Plaintiff would be entitled to all the factual material that was in any governmental report.

The Courts have also stated that when an administrative agency specifically sets forth either in an opinion or in its rules and regulations that it is depending for its decision on a particular report that that report is no longer exempt under the intra-agency exemption but should be supplied as a part of the decision. See American Mail Line, LTD vs. Gulick, 411 F. 2d

696 (District Court of Appeals, D.C. 1969) and Bristol-Myers Company vs. FTC, 424 F. 2d 935, 938 (Court of Appeals, D.C., 1970), cert. den. 400 U.S. 924.

The Court stated at page 939

"Furthermore an internal memorandum may lose its protected status when it is publically cited by an agency as the sole basis for agency action."

A review of the rules of the Secretary, specifically Rule 97.213, 97.214 (a) shows that "Based on the rank awarded to each qualification statement pursuant to the procedures provided in 97.213, the Secretary shall designate the highest rank to applicants in each state as Qualified Applicants." 97.217 and 97.218 (a) states "Potential grantees selected as a result of the procedures set forth in 97.217 shall be so notified by the Secretary. Under 97.217 (d) selection of grantees, the Secretary states that "the grantees will be selected pursuant to the procedures set forth in paragraph (b) and (c)." It is therefore clear that under the Secretary's own rules and regulations the rating procedures which should produce a rating report is the basis for the order establishing the grant. As such under the cases, these rating reports are to be provided pursuant to the Freedom of Information Act and are not exempt as internal memorandums. If the Secretary wished to have them exempt, then the Rating Procedures should not have been set forth under the rules and regulations but should have been for internal consumption only. The Plaintiff does not seek to obtain any internal letters or memorandum in which the political discussion occurred which resulted in the grant to the New York State Department of Labor and Suffolk County. All the Plaintiff requests is the formal rating reports which the Plaintiff intends to use to support its argument that the Secretary was arbitrary and capricious in denying the Plaintiff's funding request for Wayne County and Suffolk County. Similar types of information have been rules within the Act. See American Mail

Line LTD vs. Gulick, 411 F.2d 696 (District Court of Appeals, D.C. 1969)
Washington Research Project vs. Department of HEW, 366 F. Supp. 929 (U.S.,
D.C. 1973).

It is also clear that in an action for judicial review the rating reports would be discoverable by the Plaintiff.

D. THE PLAINTIFF WOULD BE SUCCESSFUL UPON A JUDICIAL REVIEW.

It is axiomatic that an administrative agency must follow its own rules and regulations. As stated in Pacific Molasses Co. vs. FTC, 356 F. 2d 386 (U.S. Court of Appeals, 5th Cir., 1966) at page 389:

"When an administrative agency promulgates rules to govern its procedures, those rules must be scrupulously observed. Service vs. Dulles, 354 U.S. 363 (1957) This is so even when the defined procedures are generous beyond the requirements that bind such agencies. Vitarelli vs. Seaton, 359 U.S. 535 (1959) For once an agency exercises its discretion and creates the procedural rules under which it desires to have its actions judged, it denies itself the right to violate these rules. U.S. ex. rel. Accardi vs. Shaughnessy, 347 U.S. 260 (1954). If an agency in its proceedings violates its rules and prejudice results, any action taken as a result of the proceedings cannot stand. Sangamon Valley Telephone Co. vs. U.S., 269 F. 2d 211 (D.C. Cir., 1959). Cirt. Den. 1964"

See also W.G. Cosby Transfer and Storage Corp. 480 F. 2d 498 (4th Cir., 1973) in which the Court pointed out that the administrative agency provided the applicable law for judicial review because it carefully defined the limits of the administrative agency's discretion. The Plaintiff in the attached Affidavit of Stuart Mitchell has provided documentation to demonstrate that the Defendants failed to follow their procedures in reviewing the eligibility statements as required as the first step and in reviewing qualification statements. Nothing in the rules and regulations permitted the Secretary to accept

a funding request from anyone who is not deemed qualified pursuant to the rules and regulations that the Secretary set up. In the Affidavit of Robert J. McConnon, a vague statement is set forth on page 9, paragraph 13, that because of the short time available, full documentation was not required. No such statement was ever made. Just the opposite occurred in that the Defendants continually informed the Plaintiff that complete documentation was required. At no time did the New York State Department of Labor or Suffolk County comply with the requirements that funds be set forth under Title 1 for the Title 3 program being applied for. At no time did the New York State Department of Labor or Suffolk County ever provide any information to demonstrate the farmworkers were either involved in the program conception or would be involved at any later stage as required by the rules and regulations. It is submitted that the New York State Department of Labor never submitted a funding request which complied with the Act or which complied with its qualification statements nor did the Wayne County funding request comply with the Act by demonstrating how Title 1 funds were to be used and what title funds were to be committed to the project and to demonstrate that as required in Rule 97.2176 "Appropriate arrangements have been made to involve farmworkers and farmworker organizations in the planning of the proposed program." Since as demonstrated by the attached Affidavit and the notifications by the Defendants which demonstrate clearly that they recognize that the Funding Requests were incomplete. The action of the Secretary in awarding grants to Suffolk County and the New York State Department of Labor for Wayne County was made arbitrarily and capriciously in violation of the rules and regulations and therefore should be set aside. In the Suffolk County telegram, Exhibit H of the Defendants' response, paragraph 5 and 4, it is clear that the requirement that Title 1 funds be available was not even specified at the time that

the grant was awarded. As indicated, this should have been done prior to the party being deemed a qualified applicant. It is also spelled out under paragraph 8, a farmworker organization and farmworkers have not been involved although their involvement was required as a part of the funding requests. The same deficiencies are present for the New York State grant which apparently has not yet been ironed out based upon the memorandum which only indicates that some action will occur in the future. In contrast, the Program Funding, Inc.'s notice explained in the Affidavit only contains questions involving the understanding of the application and did not indicate any lack of compliance with the rules and regulations. What occurred is clear. Although the statute setting up Title 3 did not set any priority for governmental agencies to administer the program as did Title 1 and Title 2 programs, the Secretary's subordinates attempted to obtain at least some grants for governmental units in the State of New York, even though those applicants did not meet the guidelines set up by the Secretary. The attempt was made to have New York State submit a proposal without going through proper procedures. This was not accomplished only by the insistence of the Plaintiff that the rules and regulations be complied with. Because of the Plaintiff's insistence, Wayne County and Geneseo Migrant Service were not deemed to be applicants who could submit funding requests. New York State Department of Labor because of its lack of involvement in supplying services to farmworkers was also unable to submit a detailed funding request. Since the Plaintiff was the only agency in New York State that had any experience in working with farmworkers and had the only New York State delivery system, its funding request could be the only application which complied with the theory of the statute and the goal of the rules to have a comprehensive State delivery system. If the Secretary can violate his own rules and illegally give grants to various agencies that he may want to prefer for political reasons,

then the intent of the statute will be defeated. The Board of Supervisors of Wayne and Suffolk County have never involved themselves as shown by the Affidavit in the interest or well being of migrants and seasonal farmworkers in their area. Their attempt to obtain the funds are only for purposes other than the interests of the Congress in attempting to provide additional services for those who are disadvantaged. A judicial review of the Court will clearly demonstrate the arbitrariness and capriciousness of the Secretary's representatives in their violating their own rules and regulations. No attempt is being made to second guess the Secretary in his discretionary function. The only attempt is to determine whether the Secretary and his officials have complied with their own rules and regulations. If they have not complied with those rules and regulations as has been set forth in the cases submitted, the action of the Secretary should be set aside.

It is thus clear that on all of the points, the Plaintiff will succeed on the merits of its various actions.

POINT III

IF A PRELIMINARY INJUNCTION DOES NOT ISSUE, THE PLAINTIFF WILL BE IRREPARABLY INJURED.

If the contracts are signed by the New York State Department of Labor and Suffolk County, then the funds available for the job training in Wayne County and Suffolk County will be committed and the Plaintiff will be unable to provide those services during the year 1975. The loss of contracts for which the Plaintiff has a legal right has been held to be irreparable injury for which a preliminary injunction may issue. See Creque d/b/a Community Motors, vs. Government of Virgin Islands, 354 F. Supp. 849 (District Court, Virgin Island, 1973).

POINT IV

IF A PRELIMINARY INJUNCTION SHOULD ISSUE, THE PUBLIC WILL NOT BE INJURED AND THE INJUNCTION WOULD BE CONSISTENT WITH THE PUBLIC INTEREST.

The Plaintiff is prepared to proceed to trial immediately or to administrative hearing upon the receipt of the information required under the Freedom of Information Act. The Plaintiff stipulated in the argument before the Federal Court that a hearing on the merits is permitted under Rule 65 (a) (2) be held so as to promptly dispose of the matter. The funding requests of Suffolk County Board of Supervisors and the Wayne County Board of Supervisors contains no request for administrative funds which were included in their general Manpower allocations. Since the grant would occur for a year no matter when it is signed, there will be no prejudice to Suffolk County or Wayne County Board of Supervisors should the grant signing be delayed. Program Funding, Inc. is presently caring for the emergency needs of seasonal farmworkers in Wayne County and Suffolk County which it will continue to do until the matter is resolved. Actual Manpower training would not occur until the summer of 1975 because of the fact that migrants do not come into the area generally until the summer of the year.

The actual programs by Suffolk County and New York State Department of Labor through Wayne County is extremely small and will not benefit many seasonal farmworkers in their area. On the other hand, Program Funding, Inc. has had to lay off thirteen employees and will have to close its Wayne County and Suffolk County offices except for minimal staff to administer other grants. The ability of Program Funding, Inc. to administer other grants when all of its administrative funds are included in the Department of Labor grant may be questionable for the future. It is clear that Program Funding, Inc. has much more to lose than either the Wayne County Board of Supervisors, New York

State Department of Labor or Suffolk County Board of Supervisors.

The public interest, however, has nothing to do with either the Plaintiff or Defendants but has to do with the governmental process in which grants and awards are made. If there is to be competitive bidding for grants and awards, does the awarding agency have to file the competitive bidding process as it has worked out in its own rules and regulations? Can administrators of the Federal Government subvert a competitive bidding process for grants and awards by making political decisions which may favor individuals or groups for whom they have some political debt or when they have been instructed to do so by a superior who has a political obligation to a local governmental official? Are rules and regulations of the Federal Government to be given the effect of law which must be followed by those both administering the rules and those who are to be administered by them? The case before the Court while only involving \$100,000 has national implications and is being followed by seasonal farmworker programs around the country to determine what type of procedures will be used in awarding new grants.

The seasonal farmworkers, migrants and rural poor who are to be served by the Federal Government will be far better served by programs which they are involved in as in the case of Program Funding, Inc. where the applications for funds have to be reviewed according to guidelines set by specialists in the area. As indicated in the record, seasonal farmworkers in New York State have supported Program Funding, Inc. and are involved in Program Funding, Inc. no farmworker involvement has been demonstrated to either the Board of Supervisors in Wayne County and Suffolk County, two counties who have in general, not been sympathetic with the problems of the rural poor. The Plaintiff has indicated its willingness to proceed immediately to trial on all matters involved which would increase the possibilities of no party being adversely affected as a

result of the proceeding. The public interest requires that the matters raised by the Plaintiff be evaluated by the Court before any further activities take place on Manpower training in New York State.

POINT V.

THE LOWER COURT'S DENIAL OF PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTION WAS AN IMPROVIDENT EXERCISE OF JUDICIAL DISCRETION AND/OR SUCH RULING WAS CONTRARY TO PRINCIPLES OF EQUITY AND FAIR PLAY.

It is well settled law and the Courts have uniformly held that a Petition for a preliminary injunction is addressed to the judicial discretion of the District Court. United States vs. Corrick, 298 U.S. 435, 437, 438, (1936). However, it should be noted that such a denial or granting of a preliminary injunction will not be overruled only in the event of an improvident exercise of judicial discretion. (emphasis added). Upon appeal an Order granting or denying such an injunction will not be disturbed unless (1) contrary to some rule of equity, or (2) the result of improvident exercise of judicial discretion. Meccano Ltd. vs. John Wanamaker, 253 U.S. 136, 141 and Doeskin Products vs. United Paper Co., 195 F. 2d 356, 358 (C.A. 7, 1952). Accordingly, this Court may look not only to see whether or not there was an abuse of discretion, but in the alternative whether or not there was any violation of any equitable principles.

The purpose of a preliminary injunction is to preserve the object of the controversy in its then existing condition -- to preserve the status quo. Doeskin Products vs. United Paper Co., Supra, at 358. The

The Court therein stated:

"The purpose of an injunction pendente lite is not to determine any controverted right, but to prevent a threatened wrong or any further perpetration of injury, or the doing of any act pending the final determination of the action whereby rights may be threatened or endangered."

The Court therein stated that it was necessary to weigh the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction.

This same dual examination has been recently expounded in Buffler vs. Electronic Computer Program Inst., Inc., 358 F. Supp. 965 (1972).

Accordingly, having the above general rules in mind and upon examination of all the papers, pleadings and memorandums herein, the Plaintiff has clearly shown in its original papers that it has and will suffer irreparable injury; that no others will be injured by the injunction; and that such injunction would certainly be beneficial and consistent with the public interest.

Defendants have failed during the entire course of this proceeding to rebut Plaintiff's allegations and proof relating to its irreparable injury, non injury to others and consistency with public interest. It will certainly be to the benefit of the rural poor of the State of New York to have a proper and expeditious determination as to the distribution of grant funds consistent with the rules and regulations set forth by the United States Department of Labor rather than by way of political considerations.

CONCLUSION

THE ORDER DENYING PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTION SHOULD BE REVERSED AND THE DEFENDANTS SHOULD BE ENJOINED FROM EXECUTING GRANT DOCUMENTS WITH THE NEW YORK STATE DEPARTMENT OF LABOR, SUFFOLK COUNTY BOARD OF SUPERVISORS AND WAYNE COUNTY BOARD OF SUPERVISORS.

Respectfully submitted,
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